



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

November 29, 1994

Ms. Tamara A. Armstrong
Assistant County Attorney
County of Travis
P.O. Box 1748
Austin, Texas 78767

OR94-767

Dear Ms. Armstrong:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 28053.

Travis County (the "county"), through its Community Supervision and Corrections Department, received a request for information relating to the county's protection of "whistle blowers," county employee discipline policies, county sexual harassment policies, and certain sexual harassment complaints. Specifically, the requestor seeks the following information:

- [1.] any and all documents pertaining to policies promulgated by the county or your department regarding anti-retaliation and/or Whistleblower protection of employees;
- [2.] any and all notices which purport to comply with the statutory notice required by the Texas Whistleblower Act;
- [3.] any and all documents pertaining to policies promulgated by the county or your department regarding progressive discipline of employees;
- [4.] any and all documents pertaining to policies promulgated by the county or your department regarding sexual harassment, including but not limited to, the investigation and administrative resolution of sexual harassment claims;

[5.] any and all documents pertaining to sexual harassment complaints against other employees of your department, steps taken by your department to investigate such complaints, and the resolution of such investigations, including but not limited to allegations made against employee Harvey Jeffries;

[6.] any and all documents which relate to the discipline, dismissal or demotion of employees of your department due in part or whole to sexual harassment charges made against them.

You advise us that the county has made the information requested in items 1 through 4 available to the requestor. You seek to withhold the remaining information under sections 552.101 and 552.103 of the Government Code. You argue that section 552.103 excepts from disclosure all of the documents contained in exhibit A and that section 552.101 excepts from disclosure the marked portions of the documents contained in exhibit B. However, after examining the documents in both exhibits, we found that all the documents in exhibit B are also contained in exhibit A. Therefore, we assume that you intended to claim that all the documents responsive to the request are excepted from disclosure by section 552.103.

Section 552.103(a) of the Government Code excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. A surmise that litigation will occur is not enough; there must be some concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5; 328 (1982). This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, *see* Open Records Decision No. 551, and when a requestor hires an attorney who then asserts an intent to sue, *see* Open Records Decision No. 555 (1990). On the other hand, the mere fact that a requestor, on more than one occasion, publicly states an intent to sue does not trigger section 552.103(a). Open Records Decision No. 452 (1986).

We believe you have demonstrated that litigation may be reasonably anticipated and that the requested information relates to the anticipated litigation. You advise us that the county employee, through his attorney, threatened to sue the county under Government Code chapter 554 ("Whistle Blower Act") if the county terminated him. Subsequently, the county terminated the employee. Furthermore, you indicate that a lawsuit under the Whistle Blower Act will require a comparison between the way the county treated this employee and the way the county treated other employees who were charged with or disciplined for sexual harassment. Thus, you have demonstrated that information regarding the charges against and discipline of other employees is related to the anticipated lawsuit under the Whistle Blower Act.

We assume, however, that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). If the opposing party in the anticipated litigation has seen or had access to any of the information in these records, no justification exists for now withholding that information from the requestor under section 552.103(a). Thus, you may withhold under section 552.103 only those portions of exhibits A and B that have not been previously available to the opposing party in the litigation.¹ As we resolve this matter under 552.103(a), we need not address the applicability of section 552.101 at this time.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Margaret A. Roll
Assistant Attorney General
Open Government Section

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Ref.: ID# 28053

¹We also note that the applicability of section 552.103(a) ends once the threat of litigation ends or the litigation itself ends. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Enclosures: Submitted documents

cc: Ms. Beth Myler
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(w/o enclosures)